

It was undisputed the claimant suffered a work-related injury to his left leg as a result of a slip and fall on September 2, 2002. This injury is the subject of Docket No. 1,006,197. It was further undisputed claimant suffered a work-related injury to his left shoulder as a result of a slip and fall on June 2, 2003. This injury is the subject of Docket No. 1,011,524. The two docketed claims were consolidated for hearing.

The Administrative Law Judge (ALJ) found the claimant did not suffer any permanent impairment to the left lower extremity in Docket No. 1,006,197. The ALJ further found the claimant sustained a 24 percent permanent partial disability to the left shoulder in Docket No. 1,011,524. Finally, the ALJ determined claimant was a full-time employee and that his average weekly wage was \$330 and increased to \$353.10 after his employment was terminated.

The claimant requests review of nature and extent of disability in Docket No. 1,006,197. Claimant argues he has a 17 percent impairment to the left lower extremity based on Dr. Swaim's rating and that Dr. Coleman's rating should be disregarded. Claimant further argues the ALJ's determination of his average weekly wage should be affirmed.

The respondent requests review of the average weekly wage in both dockets. Respondent argues the claimant was a part-time employee and his average weekly wage should be calculated accordingly. Respondent further argues claimant's fringe benefit for his 401K should be \$14.52 instead of the ALJ's determination of \$23.10.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Justin H. Major began working for the respondent in 1991. His job duties included maintenance, customer service, cooking, managing and supervising. Claimant testified that he was a full-time employee and expected to be available to work five days a week from 11 a.m. to 11 p.m. However, his working hours were typically from 3 p.m. to 10 or 11 p.m. Claimant testified that he was paid \$8.25 an hour and that respondent contributed 6 percent to his 401K plan.

On September 2, 2002, claimant slipped, fell and hit his left shin on the bottom of the ice machine. He suffered a small laceration on his left shin. Claimant sought medical treatment on September 4, 2002, and was diagnosed with cellulitis of the left leg and treated with an antibiotic and ibuprofen. Claimant was told to return for a follow up in 48 hours if his condition did not improve. The infection gradually worsened so claimant returned to the emergency room two days later and was admitted. The emergency room doctor, Mark S. Box, diagnosed the claimant with cellulitis of the left lower extremity secondary to *Staphylococcus aureus*.

The staph infection worsened and an abscess developed. On September 9, 2002, Dr. Steven Behrends performed an incision and drainage of the abscess. Claimant was released from the hospital on September 14, 2002 but kept off work and provided home

nursing for dressing changes and physical therapy. Claimant was released to return to work without restriction in November 2002.

On June 2, 2003, claimant slipped on some water and fell. He heard a popping noise in his left shoulder. Claimant sought treatment at St. Joseph Medical Health Center and then was referred to Dr. Divelbiss. Dr. Divelbiss ordered physical therapy for approximately six weeks and then rotator cuff surgery was performed on claimant's left shoulder December 1, 2003. Following the surgery, claimant was referred to physical therapy three times a week for eight weeks. Respondent released the claimant from its employment January 31, 2004.

Initially, respondent argues that claimant was not a full-time employee. Respondent relies upon wage documents attached to its submission letter as supporting its contention that claimant did not work as many hours a week as he had testified.

A submission letter is merely a party's argument based upon their view of the evidence and the law. It is intended to define the controverted issues and explain the party's position on the issues. However, such submission letters as well as the briefs filed with the Board are not part of the evidentiary record. The evidentiary record consists of the transcripts of hearings held, the testimony presented to the ALJ or by evidentiary deposition and the exhibits received into evidence. Because the ALJ's decision as well as the Board's decision on review is based on the record and not on the contents of the submission letters or briefs, any purported exhibits offered or attached to those documents are not part of the evidentiary record and cannot be considered.

In this case, the evidentiary record consisted solely of the transcript of regular hearing held April 28, 2005, the transcript of preliminary hearing held November 4, 2002, the evidentiary deposition of Truett L. Swaim, M.D., taken May 24, 2005 and the evidentiary deposition of Robert L. Coleman, M. D., taken June 16, 2005. Accordingly, the decision must be confined to the evidence contained in those records.

The claimant testified that he was a full-time employee and expected to be available to work from 11 a.m. to 11 p.m. And claimant testified that he typically worked from 3 p.m. to 10 or 11 p.m. five days a week. In the absence of contradictory evidence in the record the Board affirms the ALJ's determination that claimant was a full-time employee and his base average weekly wage was \$330.

Interestingly, the ALJ noted the unsupported information contained in the wage record attached to respondent's submission letter would not be given more weight than claimant's testimony. But the ALJ then relied upon that document to determine respondent's contribution to claimant's 401K was 7 percent. The Board disagrees. As previously noted documents attached to the submission letter, absent agreement or ALJ order, are not considered part of the evidence. Thus, the only evidence available as to respondent's contribution to the 401K was claimant's testimony that respondent

contributed 6 percent. The Board finds that the weekly contribution was \$19.80 and claimant's average weekly wage after his termination January 31, 2004, was \$349.80.

The fringe benefits were discontinued January 31, 2004. Effective February 1, 2004, the average weekly wage would be recalculated to include the fringe benefits consisting of respondent's contribution to claimant's retirement.¹ The claimant's average gross weekly wage increased to \$349.80 (\$330 + \$19.80) which changed the payment rate to \$233.21 per week. Consequently, any payments due claimant beginning February 1, 2004, and thereafter would be compensated at \$233.21 per week. Accordingly, the compensation recalculation of the Award in Docket No. 1,011,524 will utilize the correct payment rate of \$233.21 for payments after January 31, 2004.

Claimant argues he suffered permanent impairment to his left leg as a result of the slip and fall incident where he injured his shin and later developed a staph infection and abscess.

Truett L. Swaim, board certified orthopedic surgeon, examined and evaluated the claimant on September 28, 2004. Based on the *AMA Guides*², Dr. Swaim opined the claimant had a 17 percent impairment to the left lower extremity or 7 percent whole person impairment. The doctor based his rating primarily upon lower extremity muscle weakness in claimant's ankle. And he agreed that the medical records did not indicate that any other doctor found ankle weakness.

Dr. Robert L. Coleman, board certified in plastic and reconstructive surgery, examined and evaluated the claimant on April 11, 2005, at respondent's attorney's request. Dr. Coleman testified as follows:

Q. Doctor, was the situs of the original wound and the infection in the area of the shin?

A. Yes.

Q. So it was above the ankle?

A. Yes, probably midway between the knee and the ankle.

Q. How would this type of injury to the shin cause any weakness in the ankle? I understand you didn't find any weakness but another doctor testified there was weakness. How could there be a correlation between the two?

¹ K.S.A. 44-511(a)(2) .

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

A. I don't believe there is. Weakness, as you know, is generally an aberration either of the nerves that innervate the muscles or an abnormality of the muscles themselves. Certainly weakness can be caused by disuse or lack of activity or exercise but barring a medical condition of the nerves or muscles, weakness is generally due to a lack of activity.

Q. Did this injury, in your opinion, affect either the muscles or the nerves?

A. No.

Q. Was this simply something that affected the skin and the subcutaneous tissue?

A. Yes.³

Based on the *AMA Guides*, Dr. Coleman opined the claimant did not have any permanent impairment to the left lower extremity due to his accidental injury on September 2, 2002.

The claimant suffered a laceration to his shin that developed staph infection and an abscess that was drained. He was released to return to work without restrictions and worked, apparently without incident, until he suffered the second accident on June 2, 2003. The ALJ found Dr. Coleman's opinion more persuasive and determined claimant did not suffer any permanent impairment to his left leg as a result of his work-related accident. The Board agrees and affirms.

In summary, the Board affirms the ALJ's determination in Docket No. 1,006,197, that claimant did not suffer any permanent impairment. Claimant's temporary total disability compensation rate on that claim was calculated on his base average weekly wage of \$330 and paid before he was terminated. Accordingly, the temporary total disability compensation rate is not affected by the Board's modification of claimant's average weekly wage after he was terminated from employment. The ALJ's award is affirmed in all respects in Docket No. 1,006,197.

In Docket No. 1,011,524, there was no dispute regarding the nature and extent of disability. Consequently, the Board affirms the ALJ's determination that claimant suffered a 24 percent scheduled disability to the left shoulder. Moreover, the Board affirms the ALJ's determination that claimant was a full-time employee of respondent. However, as previously noted, the award in Docket No. 1,011,524 is modified to reflect claimant's average weekly wage after January 31, 2004, is \$349.80.

³ Coleman Depo. at 11-12.

AWARD IN DOCKET NO. 1,006,197

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 11, 2005, is affirmed.

AWARD IN DOCKET NO. 1,011,524

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 11, 2005, should be, and is hereby, modified as follows:

Claimant is entitled to 31.57 weeks of temporary total disability compensation at the rate of \$220.01 per week in the amount of \$6,945.72 followed by 3.14 weeks of permanent partial disability compensation, at the rate of \$220.01 per week or \$690.83 plus 43.28 weeks of permanent partial disability compensation, at the rate of \$233.21 per week, in the amount of \$10,093.33 for a 24 percent loss of use of the shoulder, making a total award of \$17,729.88.

The Board further finds claimant is entitled to future medical upon application to and approval by the Director.

IT IS SO ORDERED.

Dated this _____ day of December 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director